#329

STATE OF WISCONSIN

IN SUPREME COURT

August Term, 1949. No. 146.

WISCONSIN EMPLOYMENT RELATIONS BOARD,
Plaintiff and Respondent,

vs.

AMALGAMATED ASSOCIATION OF STREET, ELECTRIC RAILWAY AND MOTOR COACH EMPLOYEES OF AMERICA, DIVISION 998, GEORGE KOECHEL, CHARLES BREHM, THOMAS MURACH, RAYMOND KNUTSON, JACK WERY, JOE DERSINZSKI, HOWARD LYNCH, HERMAN WEBER, PAUL BREHM, PAUL KRAFT, STEVE MALICK, WILLIAM BUCHE, GEORGE SLOAN, EDWIN BECKER and OTHMAR MISCHO,
Defendants and Appellants.

APPELLANTS' BRIEF
and
APPENDIX.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 329

AMALGAMATED ASSOCIATION OF STREET, ELECTRIC RAILWAY AND MOTOR COACH EMPLOYEES OF AMERICA, DIVISION 998, ET AL., PETITIONERS,

vs.

WISCONSIN EMPLOYMENT RELATIONS BOARD

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN

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APPENDIX.

Record Page

This is an appeal from a judgment of the Circuit Court of Milwaukee County, Honorable Daniel W. Sullivan, Judge presiding, entered on the 11th day of April, 1949, adjudging and decreeing that defendants, and each of them, and the employees, servants, agents and members of said defendants, be perpetually restrained and enjoined from calling a strike, going out on strike or causing any work stoppage or slowdown which would cause an interruption of the passenger service of the Milwaukee Electric Railway and Transport Company in the State of Wisconsin, and from instigating, inducing, conspiring with or encouraging any strike, slowdown or work stoppage which would cause interruption of the public passenger service of said company.

72-89 **DECISION OF THE COURT.**

(Venue and Title Omitted.)

72 This action for injunctional relief is brought pursuant to Sec. 111.63 Stats. to prevent threatened violations of and to compel compliance with Subchapter III of Chap. 111 Stats.

The complaint alleges that the defendant, Amalgamated Association of Street, Electric Railway and Motor Coach Employes of America, Division 998, is the collective bargaining representative of all the employes of the Milwaukee Electric Railway and Transport Company, en-

gaged in the business of furnishing public passenger transportation in the state of Wisconsin, and it is alleged that said company is a public utility employer (employing approximately 2700 employes) within the meaning of Sec. 111.51 Stats.; that a contract between Division 998 and the company covering wages and working con-
73 ditions of said employes expired December 31, 1948; that the company and Division 998 have attempted unsuccessfully to negotiate an agreement for 1949; that a conciliator was appointed pursuant to Sec. 111.54 Stats.

"That on or about January 3, 1949, the membership of Division 998 in a secret referendum voted to authorize its general executive board to call a strike at such time as the board should deem proper; that pursuant to such action of the membership the general executive board fixed the date of a strike of the employes represented by said Division 998 to begin at 4 o'clock A. M. on Wednesday, January 5, 1949; and that the defendants released for publication in newspapers of general circulation in Milwaukee County, Wisconsin, an announcement of said action by the membership and by the general executive board."

"That by such actions and other conduct the defendants did, during the month of January, 1949, instigate, induce, conspire with and encourage persons employed by the company to engage in a strike and work stoppage; that the company is engaged in rendering an essential service to the public in the State of Wisconsin,

and that the continuance and uninterrupted service of the employes who are represented by Division 998 is necessary to a continuance of the performance of such essential service; and that a strike or work stoppage of said employes would cause an interruption of an essential service."

"That in obedience to a temporary restraining order issued by the Circuit Court of Milwaukee
74 County, the strike so authorized and directed by the membership and the general executive board of Division 998 was temporarily postponed and abandoned to await the outcome of the action instituted by this complaint."

"That the defendants threaten to instigate, induce, conspire with and encourage other persons to engage in a strike which will cause interruption of an essential service, and will continue to do so, in violation of Sec. 111.62 of the Wisconsin Statutes unless restrained by judgment of this court."

The answer of the defendant admits the allegations of the complaint to the effect that the employes involved "are engaged in supplying the company's public transportation service." However, the defendants deny the allegation of the complaint that the company "is a public utility within the meaning of Sec. 111.51 of the Wisconsin Statutes", and the particular allegation of paragraph 8, above quoted to the effect that the company is rendering an "essential service to the public" as such terms are used in the Wisconsin Statutes.

Sec. 111.51 (1) provides:

> " 'Public utility employer' means any employer (other than the state or any political subdivision thereof) engaged in the business of furnishing water, light, heat, gas, electric power, public passenger transportation or communication, or any one or more of them, to the public in this state. This subchapter does not apply to railroads nor railroad employes."

Sec. 111.51 (2) defines "essential service" as "furnishing . . . public transportation . . . to the public in this state." Paragraph 5 of the complaint, admitted by the answer, alleges that the 2700 employes of the company are engaged in furnishing such public transportation service. The records of the Public Service Commission, of which the Court will take judicial notice, attest to the fact that it is engaged in such 'essential service.' **Wisconsin Power & Light Co. v. Beloit,** 215 Wis. 439. Both the rates charged and the service rendered to the public is subject to regulation by the Commission under Chapters 193-194 Stats. and its service may not be discontinued without the consent of the Commission. Sec. 194.26 Stats. The answer (par. IV) alleges that the Company, with the aid of the employees represented by Division 998 transport in excess of 100,000,000 passengers annually.

The denial by the defendants that the Company is a "public utility employer" as defined in Sec. 111.51 (1) is based upon the contention, ad-

vanced in the companion case, No. 217-441, and considered in the latter case, that the company is engaged in the "railroad" business and therefore exempted from the provisions of subchapter III.

The answer of the defendants alleges further that upon the termination of a strike in the year 1934 "the company and the union agreed upon a method for the settlement of all future disputes, which method has resulted in fourteen years of uninterrupted service to the public, and which method has always been considered by both parties as adequate for the resolution of all differences which might arise between them"; that such method consisted in submitting disputes to "final and binding arbitration", and under which a similar dispute was settled in con-
76 nection with the terms and provisions of the 1948 agreement; that it was the unilateral and exclusive action of the company which resulted in the termination of the 1948 agreement, including that part of such agreement which, if not terminated, would have required the parties to arbitrate their differences in the manner aforesaid"; that Division 998 has been and still is willing to settle said dispute by voluntary arbitration, as aforesaid, and has repeatedly offered so to do.

Further answering the amended complaint, the defendants admit the appointment of a Conciliator but deny that the plaintiff had the authority to make the appointment; that the union met with the Conciliator "subject to the objections

which it had previously made to the jurisdiction of the Board to appoint such Conciliator", but that the company, although numerous offers were made by the union in an effort to settle the contract, did not recede from its original position and that in fact the final offer of the company before the Conciliator was less favorable than its prior offer; that the company did not enter into such conciliation in good faith, nor did it carry on collective bargaining in good faith; that the company has requested the plaintiff "to seek an injunction in this case for the purpose of preventing the union from engaging in collective bargaining and other activities for the mufual aid and protection of the members of the union; that on February 9, 1949, the defendants filed a charge with the National Labor Relations Board, alleging that the company had and was continuing to commit unfair labor practices under the
77 provisions of Sections 8 (a) (1) and (5) of the National Labor Relations Act by reason of the conduct immediately above set forth, and that such matter is now pending before the National Labor Relations Board."

Paragraph IV of the answer alleges facts intended to show that the Company is engaged in interstate commerce. Among the facts alleged are (a) that it is engaged in furnishing transportation service for thousands of employes of industrial and commercial establishments, most of which are engaged in the production of goods for interstate commerce; (b) that the rolling stock equipment and material used by the com-

pany are procured by it in great measure from points outside of the state, the total value of the rolling stock recently acquired being in excess of $2,000,000; that the gross operating revenue is in excess of $16,000,000 annually and that it transports in excess of 100,000,000 passengers annually; (c) "that the National Labor Relations Board in December, 1947, pursuant to the terms and provisions of the National Labor Relations Act, and upon the insistence of the company that the terms of such act be complied with, assumed jurisdiction over a controversy respecting the signing of a union security agreement under the provisions of the National Labor Relations Act, conducted an election among the employees of the company represented by the union, and certified that the union had successfully complied with all of the provisions of the National Labor Relations Act, and could enter into a union security agreement with the company; that the company is engaged in a business affecting interstate commerce and in interstate
78 commerce, and any interruption in its business as the result of a labor dispute with its employees would affect interstate commerce within the meaning and provisions of the National Labor Relations Act, (49 Stats. 449, U. S. Code Title 29, Paragraph 151-166)."

A reply was filed by plaintiff in which it is alleged that the various issues, except as hereinafter referred to, were before the court in Action No. 217-441 in this court and decided adversely to the contentions of the defendants.

The reply also denies the allegations of Paragraph VI of the answer, that there is an existing agreement for voluntary arbitration of labor disputes and that whatever agreement there may have existed has expired and has not been renewed; that the Conciliator has been unable to effectuate a settlement of the dispute and that he has so reported to the Board, and did not report any failure on the part of either party to bargain in good faith; that no charge of unfair practice or violation of law has been filed with the Board. Denies that this action is maintained at the request of the company but that it is brought at the instance of the Governor "in the interest and for the benefit of the public generally." Further alleges that the facts alleged in said Paragraph VI of the answer "are immaterial and have no bearing upon the issue as to whether an injunction should issue pursuant to Sec. 111.63 Stats."

Plaintiff moves for judgment on the pleadings.
79 The issue presented is therefore whether upon the facts admitted by the answer, either expressly or by failure to deny, plaintiff is entitled to judgment. **Madregano v. Wisconsin Gas & Elec. Co.**, 181 Wis. 611; **Kenner v. Edwards Realty & Finance Co.**, 204 Wis 575; **Direct Service Oil Co. v. Wisconsin Ice & Coal Co.**, 218 Wis. 426; 4 Bryants, Wis. Proc. (Boesel & Henderson), Secs. 563, 303; Sec. 270.63 Stats. For the purposes of this motion, it must be conceded therefore (a) that the company is engaged in interstate commerce and subject to the National Labor Relations Act, and (b) that the facts, but not the legal conclusions stated in Paragraph VI of the answer, are true.

Since the decision filed by this court in the Declaratory Relief Action, No. 217-441, three decisions have been rendered by the Supreme Court of the United States, clarifying the application of the National Labor Relation Act, as follows: **La Crosse Telephone Company v. Wis. Emp. Rel. Board**, decided Jan. 17, 1949; **International Union U. A. W., A. F. L., Local 232, v. W. E. R. B.** (decided Feb. 28, 1949); and **Algoma Plywood and Veneer Company v. W. E. R. B.** (decided Mar. 7, 1949). The **La Crosse** case reversed 251 Wis. 583. The holding of the U. S. Supreme Court in the La Crosse case is thus summarized in International Union etc., Local 232, v. W. E. R. B., as follows:

> "This case is not analogous to **Bethlehem Steel Co. v. New York State Labor Relations Board**, 330 U. S. 767, on which petitioners rely. There the state board undertook to determine the bargaining unit in an industry, an **identical** question which the **federal Board was authorized to determine**, and the two had
> 80 deliberately laid down contrary policies to govern decisions of this same matter. In that case, of course, the federal policy was necessarily given effect as the supreme law of the land. See also **La Crosse Telephone Corporation v. Wisconsin Employment Relations Board**, ante p. ...." (Emphasis added.)

The decision of the U. S. Supreme Court in International Union, etc., Local 232, v. W. E. R. B., affirmed the holding of our Supreme Court in 250 Wis. 550. The decision of the former court,

in my opinion, conclusively settles all of the issues raised in the case at bar, favorably to the contentions of the plaintiff. In substance, the court holds that the right to **"strike"** and "to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, conferred in general terms by Secs. 7 (Sec. 157 U. S. C. A.) and 10 (Sec. 163 U. S. C. A.), hereinafter discussed, are not absolute rights, beyond the control of the states in the exer ise of their police powers. These rights, it is held in **Local 232** and in the still later **Algoma** case, must be construed in the light of the decisions of the courts, "and other Acts and state laws", regulating and in proper cases even prohibiting the exercise thereof; that the National Act does not confer upon the National Board the exclusive power to prevent "any unfair labor practice," that in fact the National Board is given exclusive jurisdiction to prevent only the unfair labor practices defined in Sec. 8 (Sec. 158 U. S. C. A.), none of which are applicable here. The states are free to define and prohibit all other unfair labor practices, even though they affect interstate commerce. Sec. 8 (158) of the Federal Act, it is
81 to be noted, deals only with specific unfair labor practices on the part of the **employer** and **employee.** It does not deal with or prohibit reasonable regulations, enforcible by the state, for the protection of the interest of the **public. Local 232,** affirmed in the **Algoma** case, holds: "State regulation of practices covered by Federal law is precluded only where the latter expressly or

by clear implication indicates an intention to pre-empt the field." In every case involving a conflict between the Federal and State Acts "The substantial issue is whether Congress has protected the union conduct which the state has forbidden, and hence the state legislation must yield." An analysis of both of the cases show that there is involved here no federally protected right which the state has prohibited, or any intention on the part of the Federal Act to "pre-empt" the field.

In **Local 232**, the validity of a ruling of the Wisconsin court that a "sit down" strike, so called, was an unfair labor practice prohibited by Sec. 111.06 (2) (e) and (h) was upheld. It was contended upon the appeal to the U. S. Supreme Court the National Act "confers upon or recognizes and declares in unions and employees certain rights, privileges or immunities in connection with strikes and concerted activities, and that these are denied by the state's prohibition as laid down in this case."

Continuing, the U. S. Court stated the contentions of the Union, which are identical with those here advanced:

> "The argument is that two provisions, found in Paragraphs 7 and 13 of the Labor
> 82 Relations Act, not relevantly changed by the Labor Management Act of 1947, grant to the union and its members the right to put pressure upon the employer by the recurrent and unannounced stoppage of work. Both

Acts provide that 'Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in **concerted activities**, for the purpose of collective bargaining or other mutual aid or protection. Because the acts forbidden by the Wisconsin judgment are concerted activities and had a purpose to assist labor organizations in collective bargaining, it is said to follow that they are federally authorized and thereby immunized from state control.'"

Sec. 7 (Sec. 157, U. S. C. A.) provides:

"Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a con-
83 dition of employment as authorized in section 158 (a) (3) of this title. As amended June 23, 1947, 3:17 p. m. E. D. T., c. 120, Title I, Par. 101, 61 Stat. 140."

Sec. 13 (Sec. 163, U. S. C.) is quoted, **Local 232**, with 1947 amendments in **Local 232** case, as follows:

"Reliance also is placed upon Par. 13 of the Labor Relations Act, which provided, 'Nothing in this Act shall be construed so as to interfere with or impede or diminish in any way the right to strike.' 49 Stat. 449, 457. The 1947 Amendment carries the same provision but that Act includes a definition. Section 501 (2) says that when used in the Act 'The term "strike" includes any strike or other concerted stoppage of work by employees (including a stoppage by reason of the expiration of a collective bargaining agreement) and any concerted slowdown or concerted interruption of operation by employees.' 61 Stat. 161."

In Local 232 it was pointed out concerning "sit down strikes" that "Congress made in the National Labor Relations Act no express delegation of power to the Board to permit or forbid this particular union conduct, from which an exclusion of state power could be implied. * * *" "Congress has not seen fit in either of these Acts to declare either a general policy or to state specific rules of labor relations over which the several states traditionally have exercised control. Cf. Securities Act of 1933, Par. 18, 48 Stat. 74, 85, 84 15 U. S. C., Par. 77 (r); Securities Exchange Act of 1934, Par. 28, 48 Stats. 881, 903, 15 U. S. C., Par. 78 (bb); United States Warehouse Act, before and after 1931 Amendment, 39 Stat. 486, 490, 46 Stat. 1465, 7 U. S. C., Par. 269. However, as to coercive tactics in labor controversies, we have said of the National Labor Relations Act what is

equally true of the Labor Management Act of 1947, that **'Congress designedly left open an area for state control' and that 'the intention of Congress to exclude the States from exercising their police power must be clearly manifested.' Allen Bradley Local v. Wisconsin Employment Relations Board**, 315 U. S. 740, 750, 749." (Emphasis added.)

It was further held that the only effect of Sec. 7 (Sec. 157, U. S. C. A.) was to declare that "concerted activities" were no longer to be classified as "conspiracies" and prohibited as such. "No longer can any state, as to relations within reach of the Act, treat otherwise lawful activities to aid unionization as an illegal conspiracy merely because they are undertaken by many persons acting in concert. But because legal conduct may not be made illegal by concert, it does not mean that otherwise illegal action is made legal by concert."

The court further held that the Federal Act did "not grant a dispensation for the strike but to outlaw strikes where undertaken to enforce what the Act calls unfair labor practices" as defined in the Federal Act. "* * * And Par. 13 plus the definition only provides that 'Nothing in this Act . . . shall be construed so as to interfere with or impede' the right to engage in these activities. **What other Acts or other state laws might do is not attempted to be regulated by this section.** Since reading the definition into Par. 13 confers neither federal power to control the ac-

tivities in question nor any immunity from the exercise of state power in reference to them, it can have no effect on the right of the state to resort to its own reserved power over coercive conduct as it has done in this instance." (Emphasis added.)

Discussing the applicability of then existing court rulings with reference to which Secs. 7 and 13 were enacted and the "other Acts or other state law" permissible under the National Labor Relations Act, the court held:

> "This provision, as carried over into the Labor Management Act, does not purport to create, establish or define the right to strike. On its face it is narrower in scope than Sec. 7—the latter would be rather meaningless if 'strike' is a broader term than 'concerted activity.' Unless we read into Sec. 13 words which Congress omitted and a sense which Congress showed no intention of including, all that this provision does is to declare a rule of interpretation for the Act itself which would prevent any use of what originally was a novel piece of legislation to qualify or impede whatever right to strike exists under other laws. **It did not purport to modify the body of law as to the legality of strikes as it then existed.** This Court less than a decade earlier had stated that law to be that the state constitutionally could prohibit
86. strikes and make a violation criminal. It had unanimously adopted the language of Mr. Justice Brandeis that 'Neither the common

law, nor the Fourteenth Amendment, confers the absolute right to strike.' **Dorchy v. Kansas**, 272 U. S. 306, 311. Dissenting views most favorable to labor in other cases had conceded the right of the state legislature to mark the limits of tolerable industrial conflict in the public interest. **Duplex Co. v. Deering**, 254 U.S. 443, 488. This Court also adhered to that view. **Thornhill v. Alabama**, 310 U. S. 88, 103. **The right to strike, because of its more serious impact upon the public interest, is more vulnerable to regulation than the right to organize and select representatives for lawful purposes of collective bargaining which this Court has characterized as a 'fundamental right' and which, as the Court has pointed out, was recognized as such in its decisions long before it was given protection by the Labor Relations Act. Labor Board v. Jones & Laughlin**, 301 U. S. 1, 33." (Emphasis added.)

"As to the right to strike, however, this Court, quoting the language of Sec. 13, has said, 306 U. S. 240, 256, 'But this recognition of "the right to strike" plainly contemplates a lawful strike—the exercise of the unquestioned right to quit work,' and it did not operate to legalize the sit-down strike, which
87 state law made illegal and state authorities punished. **Labor Board v. Fansteel Corp.**, 306 U. S. 240. Nor, for example, did it make legal a strike that ran afoul of federal law,

Southern S. S. Co. v. Labor Board, 316 U. S. 31; nor one in violation of a contract made pursuant thereto, **Labor Board v. Sands Mfg. Co.**, 306 U. S. 332; nor one creating a national emergency, **United States v. United Mine Workers**, 330 U. S. 258."

The opinion then quotes from the report submitted by the House Committee of Conference showing that the foregoing was the intention of the framers of the Act. Moreover, there was "real concern" that the inclusion of a provision specifying certain specific conduct as unfair labor practices "might have a limiting effect and make improper conduct not specifically mentioned subject to the protection of the Act."

Applying the principles above set forth, the U. S. Supreme Court in **Algoma Plywood and Veneer Company v. Wisconsin Employment Relations Board**, affirming 252 Wis. 549, held that an employer who sought to enforce a "maintenance-of-membership" agreement against non-assenting employes was properly adjudicated to be guilty of an unfair labor practice under Sec. 111.06 (1) (c) (1) of the Wisconsin Act, because the provision had not been approved a two-thirds vote of the employees, even though the provision was permissible under the Federal Act.

88 The decision of the U. S. Supreme Court in the **Algoma** case also answers the contention that the making of certain applications to the Federal Board have had the effect of now barring the State Board from acting in matters within its

jurisdiction and as to which state action is not forbidden by the Federal Act.

The contention that plaintiff is barred from the relief sought by reason of arbitration provisions of previous contracts is not valid. All contracts are subject to the valid exercise of the police power of the state. Whatever the rights of the company might be if it were here seeking relief is immaterial. The right of the plaintiff under Sec. 111.63 to proceed in the public interests is clear.

Neither is there merit in the contention that an injunction will not issue to restrain a crime (Sec. 111.62 Stats.). **International Union v. Wisconsin E. R. Board,** 250 Wis. 550; **State ex rel. Cowie v. LaCrosse Theaters Co.,** 232 Wis. 153.

The pleadings show that all the facts essential to the relief sought exist. Sec. 111.62 declares it unlawful "for any person or persons to instigate, to induce, to conspire with, or to encourage any other person or persons to engage in any strike or work stoppage which would cause an interruption of an essential service." The essential allegations of paragraphs 7, 8, 9 and 10, 89 which are not denied, establish that defendants have and, unless restrained, will do the acts forbidden by Sec. 111.62. Sec. 111.63 provides the remedy of injunction. The statutory conditions have been met. 28 Am. Jur., pp. 202, 230.

The relief prayed for will be granted.

11-12 **ORDER TO SHOW CAUSE.**

(Venue and Title Omitted.)

Upon reading and filing the complaint of the Wisconsin Employment Relations Board in this action and the affidavit of Lawrence E. Gooding, Chairman of such Board, and on motion of Thomas E. Fairchild, Attorney General:

It Is Ordered that the defendants show cause before the Honorable Calendar Assignment Judge of the Circuit Court of Milwaukee County at the Court Room of said Court in the Court House, Milwaukee, Wisconsin, on the 7th day of January, 1949, at 2 P. M. of said day why a temporary injunction should not be granted restraining said defendants, and each of them, and employes, servants and agents and all members of the Union, Amalgamated Association of Street, Electric Railway and Motor Coach Employes of America, Division 998, from calling a strike, going out on a strike, causing any work stoppage or slowdown which would cause an interruption of the public passenger transportation service rendered by the Company, The Milwaukee Electric Railway and Transport Company, and from instigating, inducing, conspiring with or encouraging any such strike, slowdown or work stoppage.

12 It Is Further Ordered that until the hearing of said Order to Show Cause the defendants do absolutely desist and refrain from calling a strike, going out on a strike, causing any work stoppage or slowdown which would cause an interruption

of the public passenger service of the Company, and from instigating, inducing, conspiring with or encouraging any such strike, slowdown or work stoppage.

Dated this 4th day of January, 1949.

13 **Summons.**

14 **COMPLAINT.**

(Venue and Title Omitted.)

Now comes the Wisconsin Employment Reations Board, the plaintiff above named, by Thomas E. Fairchild, Attorney General Stewart G. Honeck, Deputy Attorney General, and Beatrice Lampert, Assistant Attorney General, who bring this action at the request of the Honorable Oscar Rennebohm, Governor of the State of Wisconsin, and for a cause of action alleges and shows to the Court:

1. That the Wisconsin Employment Relations Board is and at all times mentioned herein was, an administrative body created and existing pursuant to Chapter 111 of the Wis. Statutes for 1947; and that L. E. Gooding is the Chairman and J. E. Fitzgibbon and Henry C. Rule are members of said Board.

2. That the Union, Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, Division 998, hereinafter referred to as "Division 998," is an unincorporated voluntary labor organization which has its office and usually transacts business in the City of Milwaukee, Milwaukee County, Wisconsin.

3. That the defendants, George Koechel and Charles Brehm, are the President and Secretary, respectively, of said Division 998, and are residents of the City of Milwaukee, Milwaukee County, Wisconsin; and that the defendant, Othmar J. Mischo, is the Secretary and Treasurer of the International Union with which said Division 998 is affiliated, and that said defendant is an agent of Division 998 for purposes of collective bargaining.

4. That the Milwaukee Electric Railway and Transport Company, hereinafter called the "Company," is a Wisconsin corporation organized and existing pursuant to the provisions of Chapter 180 of the Wis. Stats. and is engaged in the business of furnishing public passenger transportation in the State of Wisconsin and is a Public Utility employer within the meaning of Section 111.51 of the Wis. Stats.

5. That the defendant, Division 998, is the collective bargaining representative of all of the employes of the Company in its Operating and Maintenance Departments, comprising approximately 2,700 employes, which departments are engaged in supplying the Company's public passenger transportation service.

6. That a contract between Division 998 and the Company covering wages and working conditions of said employes expired December 31, 1948; that the Company and Division 998 have attempted unsuccessfully to negotiate an agreement for the year 1949; that the Company has

petitioned the plaintiff for the appointment of a conciliator pursuant to Section 111.54 of the Statutes; and that the Company's petition has been scheduled for hearing by the Complainant on January 5, 1949.

7. That on January 4, 1949, the defendant, Division 998, released for publication in newspapers of general circulation in Milwaukee County, Wisconsin, a statement to the effect that the General Executive Board of Division 998 ordered a strike of the employes of the Company commencing at 4:00 o'clock A. M., Wednesday, January 5, 1949; that in connection with that release the defendant, Othmar J. Mischo, stated for publication on behalf of said Division 998 "We are not going to cooperate with the State Board in this matter."

16 8. That by such actions and other conduct the defendants have during the month of January, 1949, instigated, induced, conspired with and encouraged persons employed by the Company to engage in a strike and work stoppage; that the Company is engaged in rendering an essential service to the public in the State of Wisconsin, and that the continuance and uninterrupted service of the employes, who are represented by Division 998, is necessary to a continuance of the performance of such essential service; and that a strike or work stoppage by said employes would cause an interruption of an essential service.

9. That the defendants threatened to instigate, induce, conspire with and encourage other per-

sons to engage in a strike which will cause an interruption of an essential service and will continue to do so in violation of Section 111.62 of the Wis. Stats. unless restrained by judgment of this Court.

10. That your Complainant has responsibilities under Section 111.63 of the Wis. Stats. for enforcement of compliance with the provisions of Section 111.62.

11. That the conduct of the defendant in instigating, inducing, conspiring with and encouraging other persons to engage in a strike will work irreparable injury to the complainant and to the citizens of the State of Wisconsin; will put the complainant to the necessity of bringing a multiplicity of suits; and that your complainant has no adequate remedy at law for redress against such conduct.

12. Wherefore, the Complainant demands judgment that the defendants, and each of them, and employes, servants, and agents and all members of the Union, Amalgamated Association of Street, Electric Railway and Motor Coach Employes of America, Division 998, be perpetually restrained and enjoined from calling a strike, going out on strike, causing any work stoppage or slowdown which would cause an interruption of the public passenger service of the Company, The Milwaukee Electric Railway and Transport Company, in the State of Wisconsin, and from instigating, inducing, conspiring with or encouraging any strike, slowdown or work stoppage which would cause

interruption of the public passenger service of said Company.

18 Verification.

19 **AFFIDAVIT.**

(Venue and Title Omitted.)

State of Wisconsin, } ss.
Milwaukee County. }

L. E. Gooding, being first duly sworn on oath, says that he now is and at all of the times mentioned herein was a member of and Chairman of the Wisconsin Employment Relations Board, an administrative body created and existing pursuant to Chapter 111 of the Wis. Stats. for 1947, and that he makes this affidavit in such capacity.

That the Union, Amalgamated Association of Street, Electric Railway and Motor Coach Employes of America, Division 998, hereinafter referred to as "Division 998", is an unincorporated voluntary labor organization which has its office and usually transacts business in the City of Milwaukee, Milwaukee County, Wisconsin.

That the defendants, George Koechel and Charles Brehm, are the President and Secretary respectively of said Division 998 and are residents of the City of Milwaukee, Milwaukee County, Wisconsin; and that the defendant, Othmar J. Mischo, is the Secretary and Treasurer of the International Union with which said Division 998 is affiliated, and that said defendant is an agent of Division 998 for purposes of collective bargaining.

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That The Milwaukee Electric Railway & Transport Company, hereinafter called the "Company," is a Wisconsin corporation organized and existing pursuant to the provisions of Chapter 180 of the Wis. Stats. and is engaged in the business of furnishing public passenger transportation in the State of Wisconsin and is a Public Utility employer within the meaning of Section 111.51 of the Wis. Stats.

That the defendant, Division 998, is the collective bargaining representative of all of the employees of the Company in its Operating and Maintenance Departments, comprising approximately 2,700 employees, which departments are engaged in supplying the Company's public passenger transportation service.

That a contract between Division 998 and the Company covering wages and working conditions of said employees expired December 31, 1948; that the Company and Division 998 have attempted unsuccessfully to negotiate an agreement for the year 1949; that the Company has petitioned the Plaintiff for appointment of a conciliator pursuant to Section 111.54 of the Statutes; and that the Company's petition has been scheduled for hearing by the Complainant on January 5, 1949.

That on January 4, 1949, the defendant Division 998 released for publication in newspapers of general circulation in Milwaukee County, Wisconsin, a statement to the effect that the General Executive Board of Division 998 ordered a strike

of the employes of the Company commencing at 4:00 o'clock A. M.

That by such actions and other conduct the defendants have during the month of January, 1949, institgated, induced, conspired with and encouraged persons employed by the Company to engage in a strike and work stoppage; that the Company is engaged in rendering an essential service to the public in the State of Wisconsin, and that the continuance and uninterrupted service of the employes, who are represented by Division 998, is necessary to a continuance of the performance of such essential service; and that a strike or work stoppage by said employes would cause an interruption of an essential service.

That the defendants threatened to instigate, induce, conspire with and encourage other persons to engage in a strike which will cause an interruption of an essential service and will continue to do so in violation of Section 111.62 of the Wis. Stats. unless restrained by judgment of this Court.

That said act and doings are in violation of the rights and remedies of the Wisconsin Employment Relations Board and of the rights and remedies of the citizens of the State of Wisconsin and tends to make the judgment which complainant seeks in this action ineffectual.

Cover.

Affidavits of service on defendants.

39 **ORDER.**

(Venue and Title Omitted.)

Ordered, upon the motion of the court, that a hearing be held before this court, in Branch No. 2 thereof, at the Courthouse, in the city of Milwaukee, Wisconsin, on the 28th day of January, 1949, at 10:00 A. M., to determine whether said defendants, or any of them, are guilty of a violation of the terms and conditions of the injunctional order issued by this court on the 4th day of January, 1949.

Further Ordered, that said defendants appear personally before this Court, at said time and place, and submit to examination with reference to the matters above set forth.

Further Ordered, that a copy of this order be served upon each of the defendants and their counsel and the Attorney General at least ten (10) days prior to the date of said hearing.

Dated this 7th day of January, 1949.

By the Court,

Daniel W. Sullivan,
Circuit Judge.

40 Cover.

41 **Stipulation.**

42 **AMENDED COMPLAINT.**

(Venue and Title Omitted.)

Now comes the Wisconsin Employment Relations Board, the plaintiff above named, by Thomas E. Fairchild, Attorney General, Stewart G. Honeck, Deputy Attorney General, and Beatrice Lampert, Assistant Attorney General, who bring this action at the request of the Honorable Oscar Rennebohm, Governor of the State of Wisconsin, and for a cause of action alleges and shows to the court:

1. That, the Wisconsin Employment Relations Board, hereinafter referred to as the board, is, and at all times mentioned herein was, an administrative body created and existing pursuant to Chapter 111 of the Wisconsin Statutes and that L. E. Gooding is the Chairman and J. E. Fitzgibbon and Henry C. Rule are members of said board.

2. That the union, Amalgamated Association of Street, Electric Railway and Motor Coach Employes of America, Division 998, hereinafter referred to as Division 998, is an unincorporated voluntary labor organization which has its office and usually transacts business in the City of Milwaukee, Milwaukee County, Wisconsin.

43 3. That the defendants, George Koechel and Charles Brehm, are the president and secretary respectively of said Division 998 and are residents of the City of Milwaukee, Milwaukee County,

Wisconsin; that the defendant, Othmar J. Mischo, is the secretary and treasurer of the International Union with which said Division 998 is affiliated and that said defendant has participated and is participating in conferences held for the purpose of collective bargaining between said Division 998 and the Milwaukee Electric Railway & Transport Company; and that the other defendants above named are members of said Division 998 and of its general executive board and are residents of Milwaukee County, Wisconsin.

4. That the Milwaukee Electric Railway & Transport Company, hereinafter called the company, is a Wisconsin corporation organized and existing pursuant to the provisions of Ch. 180 of the Wisconsin Statutes; that it is engaged in the business of furnishing public passenger transportation in the State of Wisconsin; and that it is a public utility employer within the meaning of sec. 111.51 of the Wisconsin Statutes.

5. That the defendant, Division 998, is the collective bargaining representative of all of the employees of the company in its operating and maintenance departments, comprising approximately 2,700 employees, which departments are engaged in supplying the company's public passenger transportation service.

6. That a contract between Division 998 and the company, covering wages and working conditions of said employees, expired December 31, 1948; that the company and Division 998 have attempted unsuccessfully to negotiate an agreement for the

year 1949; that the company petitioned the board for the appointment of a conciliator pursuant to sec. 111.54 of the Wisconsin Statutes, and that such conciliator was duly appointed.

44 7. That on or about January 3, 1949 the membership of Division 998 in a secret referendum voted to authorize its general executive board to call a strike at such time as the board should deem proper; that pursuant to such action of the membership the general executive board fixed the date of a strike of the employees represented by said Division 998 to begin at 4 o'clock A. M. on Wednesday, January 5, 1949; and that the defendants released for publication in newspapers of general circulation in Milwaukee County, Wisconsin, an announcement of said action by the membership and by the general executive board.

8. That by such actions and other conduct the defendants did, during the month of January, 1949, instigate, induce, conspire with and encourage persons employed by the company to engage in a strike and work stoppage; that the company is engaged in rendering an essential service to the public in the State of Wisconsin, and that the continuance and uninterrupted service of the employes who are represented by Division 998 is necessary to a continuance of the performance of such essential service; and that a strike or work stoppage of said employes would cause an interruption of an essential service.

9. That in obedience to a temporary restraining order issued by the Circuit Court of Milwaukee

County, the strike so authorized and directed by the membership and the general executive board of Division 998, was temporarily postponed and abandoned to await the outcome of the action instituted by this complaint.

10. That the defendants threaten to instigate, induce, conspire with and encourage other persons to engage in a strike which will cause interruption of an essential service, and will continue to do so, in violation of sec. 111.62 of the Wisconsin Statutes unless restrained by judgment of this court.

45 11. That your complainant has a responsibility under Sec. 111.63 of the Wisconsin Statutes for enforcement of compliance with the provisions of Sec. 111.62.

12. That the conduct of the defendants in instigating, inducing, conspiring with and encouraging other persons to engage in a strike will work irreparable injury to the complainant and to the citizens of the State of Wisconsin; will put the complainant to the necessity of bringing a multiplicity of suits; and that your complainant has no adequate remedy at law for redress against such conduct.

Wherefore, the complainant demands judgment that the defendants, and each of them, and employees, servants, and agents and members of the Amalgamated Association of Street, Electric Railway and Motor Coach Employes of America, Division 998, be perpetually restrained and enjoined from calling a strike, going out on strike, or causing any work stoppage or slowdown which

would cause an interruption of the public passenger service of the Milwaukee Electric Railway & Transport Company, in the State of Wisconsin, and from instigating, inducing, conspiring with or encouraging any strike, slowdown or work stoppage which would cause interruption of the public passenger service of said company, and for such other relief as may be appropriate in the premises.

46 Cover.

47 **STATEMENT OF DEFENDANTS.**

(Venue and Title Omitted.)

This statement is made on behalf of the defendants in this action, and in response to the order of this court dated January 7, 1949, directing that a hearing be held to determine whether the defendants, or any of them, are guilty of a violation of the terms and conditions of the injunctional order issued by this court on the 4th day of January, 1949.

The facts immediately preceding and following the issuance of the temporary restraining order were as follows:

About mid-afternoon of Tuesday, January 4, 1949, the Executive Board of Division 998, Amalgamated Association of Street, Electric Railway and Motor Coach Employes of America, pursuant to the directions of the membership of that organization, and after final attempts at settlement of their dispute had failed, set the time for

a strike of its members as of 4:00 A. M., Wednesday, January 5th. This action was reported to the Milwaukee Electric Railway and Transport
48 Company, the employer, and to the press.

The press was also advised by counsel for Division 998 that if a restraining order was issued in proper form by a court of competent jurisdiction, prior to the effective time of the strike, the union would have no choice but to comply with such order and to rescind the strike action.

On the evening of January 4, 1949, starting at about 8:00 P. M., a regular general meeting of the membership of Division 998 was held. At this meeting the reasons for the calling of a strike were explained.

Counsel for the union was present at the meeting and was called upon to advise the members of the probable course of events. He stated that there was a possibility that a temporary restraining order would be served upon the union and its officers some time during that night, and that if that should occur the officers and Executive Board would have to call off the strike. In response to numerous questions about the duties of the membership in that situation, he strongly warned against advisability of individual action, pointed out that concerted action would be in violation of the criminal provisions of the Wisconsin law, and recommended that the members follow the directions and orders of the general Executive Board.

George Koechel, President of the Union, also addressed the meeting and also requested the employees to comply with any order or request of the Executive Board calling off the strike in accordance with any court order that might be served.

The meeting adjourned at about 9:20 P. M.

49 Shortly thereafter, after all of the officers and most of the members had left the meeting hall, two Deputy Sheriffs arrived at the hall and stated that they had some papers which were signed by Judge Sullivan and which they were required to serve upon the officers. Upon being advised that no officers were present, the Deputy Sheriffs stated that they would make service at their homes.

At about 10:30 P. M. counsel for the union located President George Koechel and informed him of the fact that a temporary restraining order had been signed by Judge Sullivan and that Deputy Sheriffs were looking for him for service. The Sheriff's Office was then called and was advised where Mr. Koechel could be located, and at about 11:15 P. M. the Deputies arrived and served Mr. Koechel, both as an individual and as President of the union.

The Deputies were advised at that time that in view of the nature of the court order, a meeting of the Executive Board would be called immediately, and that if the Deputies so desired they could remain until the members of the Executive Board arrived and at that time make

service upon those members. The Deputies declined the invitation and said they would continue in their efforts to serve the other defendants at their homes.

Starting at about 11:30 P. M. efforts were made to reach all Executive Board members for a special meeting. By 1:00 A. M., Wednesday, January 5th, most of the Executive Board members appeared for the meeting. At that time the Sheriff's Office was again called and invited to come to the meeting for the purpose of completing service on those who had not yet been served at home. This was done.

Starting at 1:30 A. M. on the morning of January 5th, the Executive Board examined and discussed the nature of the order served on them, and their duties under the order. They were again advised by counsel for the union that unless the strike was called off immediately and good faith efforts made to assure continued operation of transit facilities; they would be in contempt of court.

At about 2:00 A. M. Wednesday, January 5th, the Executive Board took official action calling off the strike, and requesting all members to report for work as usual. The exact language was as follows:

> "In compliance with the temporary restraining order served on us late tonight, we request all members of Division 998, to report for work at their regular starting time

and to ignore the strike notice issued Tuesday afternoon."

This action was immediately reported to representatives of the press and radio who were awaiting word from the Executive Board and was fully publicized by both press and radio during the following hours. The members of the Executive Board felt that this was as prompt and effective a means of notification available to them in view of the circumstances.

On the morning of Jan. 5th, however, some of the members had not heard that the strike was called off, and did not report at the regular starting time. Of those who did report, some commenced their daily runs, while others refused to do so. Some of those who refused to start work, then prevailed upon others to discontinue and by about 9:00 A. M. all streetcars and buses were back at their terminals.

51 Most of that morning (Wednesday, January 5th) President Koechel was present at a hearing before the Wisconsin Employment Relations Board held at the Milwaukee County Court House for the purpose of determining whether or not a Conciliator should be appointed.

At the conclusion of such hearing, he received full reports from the Executive Board members with respect to the difficulty they met in urging the men to return to work. The Board members were advised to continue their efforts, and in view of reports that many members were doubt-

ing the authenticity of the no-strike order, an official written order was issued by President Koechel. This order read as follows:

"January 5, 1949.

Members: Division #998.

The General Executive Board of Division #998 urgently requests all members who are employed at the Transport Company to return to their jobs **immediately.** This is an official order and **must** be complied with. No one has the authority to advise you otherwise.

This is your obligation to the Court and the public, as well as to your Union.

George Koechel,
President."

The text of this order was given to all radio stations in the Milwaukee area with the request that as a public service it be announced over
52 their facilities as frequently as possible. Two of the largest radio stations in the Milwaukee area took wire recordings of Mr. Koechel reading the message and broacast those recordings throughout the afternoon and evening.

In addition, copies of the above order were made on the union's official letterhead and taken by Executive Board members to the various car stations and terminals and posted upon the bulletin boards.

Early in the evening of January 5th, 1949, the union received a telephone call from Professor

Nathan Feinsinger, of the University of Wisconson Law School, who had been appointed earlier that day by the Wisconsin Employment Relations Board as a Conciliator to attempt settlement of the dispute. Professor Feinsinger offered his services in terminating the work stoppage.

He was advised that, from all information the officers of the union had been able to gather during the course of the day, it appeared that some of the members were insisting that they would not return to work unless the dispute was settled or the Transport Company agreed to voluntary arbitration; and other members were insisting that at the very least a general mass meeting be held the following day for the purpose of discussing the situation and learning the contents of the temporary restraining order and the reason for the action of the Executive Board calling off the strike.

At about 2:00 A. M. Thursday, January 6th, Mr. Koechel was advised by telegram from Professor Feinsinger that Chairman Gooding of the Wisconsin Employment Relations Board was willing to recommend dismissal of the temporary restraining order if that might sufficiently clear the atmosphere and encourage resumption of operations.

53 This fact was immediately conveyed to the press and radio, together with another order directing the men to return to work immediately. Copies of the telegram were given to each Executive Board member with directions to proceed

immediately to the car stations and shops and to make its contents known. All members of the Executive Board were directed to continue in their efforts to get the men to return.

President Koechel made a personal appearance at one of the largest car stations where most of the resistance to resuming operations seemed to be centered and succeeded in persuading the employees to report for duty. The other Executive Board members and officers met with similar success, and commencing with the morning of January 6th, 1949, normal operations were resumed.

54 Cover.

55 **ANSWER.**

(Venue and Title Omitted.)

Now come the above named defendants, by Padway, Goldberg & Previant, their attorneys, and for answer to plaintiff's complaint herein admit, deny and allege as follows:

I.

Admit the allegations of Paragraph 1.

II.

Admit the allegations of Paragraph 2.

III.

Admit the allegations of Paragraph 3.

IV.

Answering the allegations of Paragraph 4, 56 admit that the Milwaukee Electric Railway and Transport Company is a Wisconsin corporation, engaged in the business of furnishing public passenger transportation in the State of Wisconsin, but deny that it is a public utility employer within the meaning of Section 111.51 of the Wisconsin Statutes.

Further answering the allegations of Paragraph 4, defendants allege that the Milwaukee Electric Railway and Transport Company is a Wisconsin corporation which provides, furnishes and sells transportation services to and for residents of the City of Milwaukee and contiguous suburbs and political subdivisions, including thousands of employes of many large industrial and commercial establishments in the City and County of Milwaukee, State of Wisconsin, most of which establishments are engaged in the production of goods for interstate commerce or in interstate commerce, and the services of which employes are essential to such production of goods for interstate commerce; that the rolling stock, equipment and material used by the company are procured in great measure by it from many and diverse points outside the State of Wisconsin, the total value of the rolling stock recently acquired by the company from such points outside the State of Wisconsin, being in excess of the amount of Two Million Dollars ($2,000,000.00); that the gross operating revenues of the company are in excess of Sixteen Million

Dollars ($16,000,000.00) annually, and that it transports in excess of one hundred million (100,000,000) passengers annually; that the National Labor Relations Board in December, 1947, pursuant to the terms and provisions of the National Labor Relations Act, and upon the insistence of the company that the terms of such act be complied with, assumed jurisdiction over a controversy respecting the signing of a union security agreement under the provisions of the National Labor Relations Act, conducted an election among the employees of the company represented by the union, and certified that the union had successfully complied with all the provisions of the National Labor Relations Act, and could enter into a union security agreement with the company; that the company is engaged in a business affecting intersiate commerce and in interstate commerce, and any interruption in its business as the result of a labor dispute with its employees would affect interstate commerce within the meaning and provisions of the National Labor Relations Act (49 Stats. 449, U. S. Code, Title 29, Paragraph 151-166);

57

V.

Admit the allegations of Paragraph 5.

VI.

Admit the allegations of Paragraph 6, and further allege as follows:

That in the year 1934 the employees of the Company represented by the Union engaged in

a strike growing out of the refusal of the company to recognize the Union as the exclusive collective bargaining representative of its employees;
58 that upon the termination of such strike the Company and the Union agreed upon a method for the settlement of all future disputes, which method has resulted in fourteen years of uninterrupted service to the public, and which method has always been considered by both parties as adequate for the resolution of all differences which might arise between them; that such method consisted of an agreement between the parties that should any dispute arise during the term of the collective bargaining agreement or over the terms of a new collective bargaining agreement, then such dispute shall be submitted to final and binding arbitration before a tribunal created by mutual consent and choice of both parties; that the Union always has been, and still is, willing to settle the instant controversy with respect to the terms of a new collective bargaining agreement in this manner, just as a similar dispute was settled in connection with the terms and provisions of the 1948 agreement; that it was the unilateral and exclusive action of the company which resulted in the termination of the 1948 agreement, including that part of such agreement which, if not terminated, would have required the parties to arbitrate their differences in the manner aforesaid;

That Division 998 has repeatedly offered during the course of the negotiations with the company to submit the instant dispute to voluntary

arbitration, under the terms of which offer the union would appoint two arbitrators, and the
59 company would appoint two arbitrators; that such arbitrators so appointed would then meet daily for the purpose of selecting a fifth arbitrator or impartial chairman of the Board; that if the parties could not agree upon such fifth arbitrator or chairman of the board, then such fifth arbitrator to be chosen from a list submitted to the parties by the Federal Mediation and Conciliation Service.

Further answering the allegations of Paragraph 6, admit that a Conciliator was appointed by the Wisconsin Employment Relations Board, but deny that the Board had the authority to appoint such Conciliator for the reasons which are hereinafter set forth.

Further answering Paragraph 6, allege that the Union met with the Conciliator, subject to the objections which it had previously made to the jurisdiction of the Board to appoint such Conciliator, and that during the process of conciliation (which terminated on January 29) the Union made numerous offers in an effort to settle the contract, but during the entire conciliation period, the company did not recede from the position which it had originally taken, which led to the appointment of the Conciliator, and that in fact the Company's final offer during the process of conciliation was an offer which was less favorable and desirable to the Union than any offer it had previously made prior to the arbitration;

that the Company did not enter into such conciliation in good faith, nor did it carry on any collective bargaining in good faith during the process of the conciliation; that the Company repeatedly insisted during the course of the conciliation that the only way this matter could be determined would be through a statutory arbitration under the Wisconsin Statutes, refused all offers of voluntary arbitration, and recommendations of the Conciliator, and that the Company is seeking to use the facilities of the Wisconsin Employment Relations Board in this case to obviate its duty to bargain collectively and in good faith; that the Company has requested the Wisconsin Employment Relations Board to seek an injunction in this case for the purpose of preventing the Union from engaging in collective bargaining activities and other activities for the mutual aid and protection of the members of the Union; that on February 9, 1949, the defendants filed a charge with the National Labor Relations Board alleging that the Company had and was continuing to commit unfair labor practices under the provisions of Section 8 (a) (1) and (5) of the National Labor Relations Act by virtue of the conduct immediately above set forth, and that such matter is now pending before the National Labor Relations Board.

VII.

Admit the allegations of Paragraph 7.

VIII.

Deny the allegation in Paragraph 8 that the Company is engaged in rendering an "essential service to the public" in the State of Wisconsin, as such terms are used and contemplated by the 61 Wisconsin Statutes.

IX.

Admit the allegations of Paragraph 9.

X.

Answering the allegations of Paragraph 10 allege that defendants intend to do only that which they may lawfully do.

XI.

Deny the allegations of Paragraph 11.

XII.

Further answering the complaint herein, defendants allege that if the relief prayed for is granted to the complainant, the judgment granting such relief and any statutes upon which such judgment may purportedly be based are null and void, and of no effect whatsoever for the following reasons:

(a) Contrary to the provisions of Article I, Section 8, and Article VI of the Constitution of the United States, in that it is in conflict with the Act of Congress known as the National Labor Relations Act or the Labor Management Rela-

tions Act of 1947 (Public Law 101, 80th Congress, June 23, 1947);

(b) Contrary to the provision of the Thirteenth Amendment to the Constitution of the United States, in that it imposes involuntary servitude upon the union and its members and the defendants herein;

(c) Contrary to the Fourteenth Amendment to the Constitution of the United States, in that it deprives the union and its members, and the defendants herein of their liberty and property without due process of law, and of the equal protection of the laws, and deprives the Union and its members of the right to peacefully assemble, express themselves, and to engage in the basic civil right of collective bargaining and self-organization;

(d) Contrary to Article I, Sections 1, 2, 3, 4, 9 and 12 of the Constitution of the State of Wisconsin, in that it deprives the union and its members of the rights therein provided for;

(e) Contrary to the provisions of Section 133.07, Wisconsin Statutes;

(f) That any Statute upon which such relief could be predicated is an inseparable part of Chapter 414, Wisconsin Laws, 1947, the remaining sections of which are unconstitutional, null, and void, and of no effect whatsoever because:

(1) Contrary to Article IV, Section 1, Article V, Section 1, and Article VII, Section 2, of the Constitution of the State of Wisconsin, in that it

constitutes an unlawful delegation of legislative, executive and judicial powers;

(2) Contrary to Article VII, Section 16, of the Constitution of the State of Wisconsin, in that the legislature has no authority to establish any tribunals of conciliation with the power to render judgment obligatory on the part of the parties unless the parties voluntarily submit their matter in difference to arbitration and agree to abide the judgment or assent thereto in writing;

(3) Contrary to Chapter 16, Wisconsin Stat-
63 utes, 1947, in that the parties which have been and may be appointed by the Wisconsin Employment Relations Board to act as conciliators and arbitrators under the provisions of Chapter 414, Wisconsin Laws, 1947, have been and are so appointed without regard to and in violation of the provisions of said Chapter 16;

(4) Contrary to Article XIII, Section 9, of the Constitution of the State of Wisconsin.

Wherefore, Defendants pray that the complaint herein be dismissed.

Padway, Goldberg & Previant,
Attorneys for Defendants.

64 Verification (omitted).

66 **REPLY.**

(Venue and Title Omitted.)

The plaintiff, Wisconsin Employment Relations Board, through its attorneys, Thomas E. Fair-

child, Attorney General, Stewart G. Honeck, Deputy Attorney General and Beatrice Lampert, Assistant Attorney General, replying to the answer of the defendants above named denies and alleges as follows:

1. With respect to the allegations of paragraphs IV and XII of said answer, the plaintiff alleges that a suit was heretofore brought by the defendants against the plaintiff, Wisconsin Employment Relations Board, in the Circuit Court for Milwaukee County in the State of Wisconsin, wherein the complaint prayed for a judgment enjoining and restraining this defendant from enforcing any provisions of Ch. 414, Laws of 1947 and for such other relief as the court should deem just, on the grounds that said statutes are invalid and inapplicable to the defendants above named for the reasons alleged in said paragraphs IV and XII of the answer herein; that this defendant duly filed an answer in said action; that thereupon the matter was fully argued and briefed before the court; that on or about the 30th day of December, 67 1948, the court issued its decision against the contentions of the plaintiffs herein on the issues so raised; and that on the 4th day of January, 1949 the court issued and filed its judgment adjudging that the provisions of Ch. 414, Laws of 1947, as contained in sec. 111.50 to 111.65 of the Wisconsin Statutes, to be valid and applicable to the Milwaukee Electric Railway and Transport Company and its employees; that by said judgment the matters and issues raised by paragraphs IV and XII of the defendants' answer herein were

finally adjudicated and settled, and that the defendants are thereby barred from defending this action on said grounds; that the facts and circumstances alleged in this paragraph are a matter of record in the office of the Clerk of the Circuit Court for Milwaukee County in the action entitled Amalgamated Association of Street, Electric Railway and Motor Coach Employes of America, Division 998, George Koechel and Charles Brehm, Plaintiffs, v. The Milwaukee Electric Railway & Transport Compa[illegible] and the Wisconsin Employment Relations Board, Defendants, Case #217-441, to which record reference is hereby made and the same is made a part hereof as if specifically set forth herein.

2. With respect to the allegations contained in paragraph VI of the defendants' answer the plaintiff denies that there is at the present time any agreement between the defendants and the Milwaukee Electric Railway and Transport Company providing for voluntary arbitration of labor disputes; but alleges that whatever agreement there may have been as to such matters has expired and has not been renewed; alleges that the conciliator appointed by the board, Nathan P. Feinsinger, has reported to the board that he has been unable to effectuate a settlement of the
68 labor dispute between the company and the defendants; that said conciliator has reported to the board the negotiations through which he endeavored to effectuate a settlement of the dispute and has not reported a refusal on the part of either party to bargain in good faith; that no

charge of unfair practice or of violation of law has been filed with the board by reason of any refusal on the part of the company to engage in collective bargaining; that the board does not maintain this action at the request of the Milwaukee Electric Railway and Transport Company but that it brought and maintains said action at the request of the governor in the interest and for the benefit of the public generally; that as to the other matters alleged in said paragraph the plaintiff has no information sufficient to form a belief and therefore denies the same; but that as to all of the facts alleged in paragraph VI of the answer the plaintiff alleges that the same are immaterial to this action and have no bearing upon the issues whether an injunction should issue pursuant to sec. 111.63 of the statutes.

STIPULATION TO ADOPT FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT.

(Venue and Title Omitted.)

Whereas the original findings of fact, conclusions of law and judgment in the above matter of which the attached is a true and correct copy were duly signed and filed by the Hon. Daniel Sullivan, Judge of the Circuit Court of Milwaukee County, Wisconsin, on the 11th day of April, 1949, and

Whereas said original cannot be found, Now, Therefore,

It Is Stipulated by and between the parties to the above entitled action by their respective attorneys, that the attached true and correct copy of said findings of fact, conclusions of law and judgment may be substituted and serve for the originals and may be included as such in the record transmitted to the Supreme Court of the State of Wisconsin in the appeal from said judgment.

Dated September 23, 1949.

91 **FINDINGS OF FACT AND CONCLUSIONS OF LAW.**

(Venue and Title Omitted.)

This action coming on for trial of the issues of law raised by the pleadings, upon plaintiff's motion for judgment on the pleadings, on the 16th day of February, 1949, and Beatrice Lampert, appearing for the plaintiff and David Previant appearing for the defendants, and after hearing the arguments of counsel and being advised in the premises, I hereby make and file the following findings of fact and conclusions of law constituting my decision in said action:

Findings of Fact.

1. That the Wisconsin Employment Relations Board (hereinafter referred to as the board) is and at all times mentioned herein was an administrative body created and existing pursuant to Chapter 111 of the Wisconsin Statutes and that it has responsibility under Sec. 111.63 of the

Wisconsin Statutes for enforcement or compliance with the provisions of Sec. 111.62.

92 2. That the defendant, Amalgamated Association of Street, Electric Railway and Motor Coach Employes of America, Division 998 (hereinafter referred to as Division 998), which has its office and usually transacts business in the City of Milwaukee, Milwaukee County, Wisconsin, is the collective bargaining representative of all employees of the Milwaukee Electric Railway and Transport Company, and that the other named defendants are officers or representatives of said Division 998.

3. That the Milwaukee Electric Railway and Transport Company is engaged in the business of furnishing public passenger transportation service in Milwaukee County, Wisconsin; that it employs approximately 2700 employees for the purpose of carrying out such service, who are represented by Division 998 for purposes of collective bargaining; that it transports in excess of 100,000,000 passengers annually.

4. That on or about January 3, 1949, the membership of Division 998 in a secret referendum voted to authorize its general executive board to call a strike at such time as the board should deem proper; that pursuant to such action of the membership the general executive board fixed the date of the strike of the employees represented by said Division 998 to begin at 4 o'clock A. M. on Wednesday, January 5, 1949; that the defendants released for publication in newspapers of general

circulation in Milwaukee County, Wisconsin, an announcement of said action by the membership and by the general executive board.

5. That in obedience to a temporary restraining order issued by the Circuit Court of Milwaukee County the strike so authorized and directed by the membership and the general executive board of Division 998 was temporarily postponed to
93 await the outcome of the action instituted by this complaint.

6. That the defendants threaten to instigate, induce, conspire with and encourage other persons, more specifically 2700 employees of the Milwaukee Electric Railway and Transport Company, to engage in a strike.

7. That the service of such persons described in the preceding finding are essential to carrying out the operations of said Milwaukee Electric Railway and Transport Company.

8. That the public passenger transportation service furnished by the Milwaukee Electric Railway and Transport Company is furnished wholly by street car and motor bus within Milwaukee County, Wisconsin; that said service furnished to and for residents of the City of Milwaukee and contiguous suburbs is utilized by employees of many establishments engaged in production of goods for interstate commerce; that the equipment utilized by the company in rendering such service is procured in great measure from points outside the State of Wisconsin; that the National Labor Relations Board conducted an election

among employees of the company represented by Division 998 respecting the signing of a union security agreement and certified as a result of said election that Division 998 had complied with the conditions of the National Labor Relations Act so as to remove any obstacles under that act from entering into a union security agreement.

9. That the defendants threaten to instigate, induce, conspire with and encourage other persons, more specifically 2700 employees of the Milwaukee Electric Railway and Transport Company, to engage in a strike which will cause interruption of an essential service.

94 10. That such conduct of the defendants will work irreparable injury to the plaintiff and to the citizens of the State of Wisconsin, will put the plaintiff to the necessity of bringing a multiplicity of suits, and that said plaintiff has no adequate remedy at law for redress against such conduct.

Conclusions of Law.

1. That the Milwaukee Electric Railway and Transport Company is a public utility employer within the meaning of sec. 111.51 (1) of the statutes and that its transportation service rendered within Milwaukee County, Wisconsin, is an essential service within the meaning of sec. 111.51 (2) of the statutes.

2. That the conduct of the defendants which the plaintiff seeks to restrain is not guaranteed by any federal statute.

3. That the Circuit Court for Milwaukee County has jurisdiction over the parties and the subject matter to this proceeding.

4. That judgment should enter granting the perpetual injunction and restraining order prayed by the plaintiff.

Let Judgment be entered accordingly.

Dated April 1, 1949.

95 **SUBSTITUTED JUDGMENT.**

(Venue and Title Omitted.)

This action coming on for trial before the court of the issues of law raised by the pleadings, upon motion of the plaintiff for judgment on the pleadings, on the 16th day of February, 1949, and Beatrice Lampert appearing for the plaintiff and David Previant appearing for the defendants, and the court having heard the arguments of counsel and being advised in the premises and having heretofore issued its decision, findings of fact, conclusions of law and directions for judgment, Now, Therefore,

It Is Adjudged and Decreed That the Amalgamated Association of Street, Electric Railway and Motor Coach Employes of America, Division 998, George Koechel, Charles Brehm, Thomas Murach, Raymond Knutson, Jack Wery, Joe Dersinzski, Howard Lynch, Herman Weber, Paul Kraft, Steve Malick, William Buche, George Sloan, Edwin Becker and Othmer Mischo, and each of them, and employees, servants, agents

and members of said defendants be perpetually restrained and enjoined from calling a strike, going out on strike or causing any work stoppage or slowdown which would cause an interruption
96 of the passenger service of the Milwaukee Electric Railway and Transport Company in the State of Wisconsin, and from instigating, inducing, conspiring with or encouraging any strike, slowdown or work stoppage which would cause interruption of the public passenger service of said company; all subject to Section 111.64, Wisconsin Statutes.

Dated April ..., 1949.

By the Court.

Fred J. Jaeger,

Clerk,

By Harold H. Gruettner,

Deputy Clerk.

97 Cover.

98 **Admission of service by Padway, Goldberg & Previant on notice of entry of findings.**

99 **Notice of entry of findings of fact and conclusions of law.**

100- **Findings of fact and conclusions of law** (same
103 as Record 91-94; set forth herein at pp. 61-66).

104 Cover.

105 **Admission of service of judgment and findings by Padway, Goldberg & Previant.**

106 **Notice of entry of judgment.**

107- **Judgment** (same as Record 95-96; set forth
108 herein at pp. 155-156).

109 Cover.

110 **NOTICE OF APPEAL.**

(Venue and Title Omitted.)

Please Take Notice that the defendants above named hereby appeal to the Supreme Court of the State of Wisconsin from the judgment rendered by the above named court herein entered on the 11th day of April, 1949, in favor of the plaintiff and against the defendants and from the whole thereof.

Dated September 7th, 1949.

111 **WAIVER OF UNDERTAKING.**

(Venue and Title Omitted.)

The undersigned herewith waives the filing and serving of an undertaking for costs on appeal in the above entitled action as required by the Wisconsin Statutes.

Dated September 8, 1949.

112 Cover.

113 **Certificate of clerk.**

INDEX TO APPENDIX.

[fol. 160] Pleas before the Supreme Court of the State of Wisconsin at a term thereof begun and held at the Capitol in Madison, the seat of government of said State on the Second Tuesday, to-wit: the Ninth day of August, A. D. 1949.

Present: Hon. Marvin B. Rosenberry, Chief Justice; Hon. Oscar M. Fritz, Hon. Edward T. Fairchild, Hon. Henry P. Hughes, Hon. John E. Martin, Hon. Grover L. Broadfoot, Justices.

Be it remembered that heretofore, to-wit: on the thirtieth day of September in the year of our Lord One Thousand Nine Hundred and Forty-nine came into the office of the Clerk of the Supreme Court of the State of Wisconsin, the Amalgamated Association of Street, Electric Railway and Motor Coach Employes of America, Division 998, George Koechel, Charles Brehm, Thomas Murach, Raymond Knutson, Jack V ry, Joe Dersinzski, Howard Lynch, Herman Weber, Paul Kraft, Steve Malick, William Buche, George Sloan, Edwin Becker and Othmer Mischo, by their attorneys and filed in said Court their certain Notice of Appeal, according to the statute in such case made and provided, and also the Return to such appeal, of the Clerk of the Circuit Court of Milwaukee County, in said State, in words and figures following, that is to say:

[fol. 161] [Stamp:] Filed Sep. 12, 1949. Fred J. Jaeger, Clerk

STATE OF WISCONSIN, CIRCUIT COURT, MILWAUKEE COUNTY

218-489

WISCONSIN EMPLOYMENT RELATIONS BOARD, Plaintiff,

vs.

AMALGAMATED ASSOCIATION OF STREET, ELECTRIC RAILWAY AND MOTOR COACH EMPLOYES OF AMERICA, DIVISION 998, George Koechel, Charles Brehm, Thomas Murach, Raymond Knutson, Jack Wery, Joe Dersinzski, Howard Lynch, Herman Weber, Paul Kraft, Steve Malick, William Buche, George Sloan, Edwin Becker and Othmer Mischo, Defendants

NOTICE OF APPEAL

To Thomas E. Fairchild, Esq., Attorney for Plaintiff, and Fred J. Jaeger, Clerk of the Aforesaid Court:

Please Take Notice that the defendants above named hereby appeal to the Supreme Court of the State of Wisconsin from the judgment rendered by the above named court herein entered on the 11th day of April, 1949, in favor of the plaintiff and against the defendants and from the whole thereof.

Dated September 7th, 1949.

Padway, Goldberg & Previant, Attorneys for Defendants.

Service of a copy of the within admitted this 8 day of September, 1949.

Beatrice Lampert, Plaintiff's Attorney.

Service admitted this 12th day of September, 1949.

Fred J. Jaeger, Clerk of Circuit Court, Milwaukee County, Wis.

Filed Sep. 30, 1949. Arthur A. McLeod, Clerk of Supreme Court, Madison, Wis.

[fol. 162] [Stamp:] Filed Sep. 12, 1949. Fred J. Jaeger, Clerk

STATE OF WISCONSIN, CIRCUIT COURT, MILWAUKEE COUNTY

WISCONSIN EMPLOYMENT RELATIONS BOARD, Plaintiff,

vs.

AMALGAMATED ASSOCIATION OF STREET, ELECTRIC RAILWAY AND MOTOR COACH EMPLOYES OF AMERICA, DIVISION 998, George Koechel, Charles Brehm, Thomas Murach, Raymond Knutson, Jack Wery, Joe Dersinzski, Howard Lynch, Herman Weber, Paul Kraft, Steve Malick, William Buche, George Sloan, Edwin Becker and Othmer Mischo, Defendants

WAIVER OF UNDERTAKING

The undersigned herewith waives the filing and serving of an undertaking for costs on appeal in the above entitled action as required by the Wisconsin Statutes.

Dated September 8, 1949.

Thomas E. Fairchild, Attorney General, by Beatrice Lampert, Assistant Attorney General.

Filed Sep. 30, 1949. Arthur A. McLeod, Clerk of Supreme Court, Madison, Wis.

[fol. 163] And afterwards to-wit on the 2nd day of May, A. D. 1950, the same being the 63rd day of said term, the judgment of this Court was rendered in words and figures following, that is to say:

MILWAUKEE CIRCUIT COURT

WISCONSIN EMPLOYMENT RELATIONS BOARD, Respondent,

vs.

AMALGAMATED ASSOCIATION OF STREET, ELECTRIC RAILWAY AND MOTOR COACH EMPLOYES OF AMERICA, DIVISION 998, George Koechel, Charles Brehm, Thomas Murach, Raymond Knutson, Jack Wery, Joe Dersinzski, Howard Lynch, Herman Weber, Paul Kraft, Steve Malick, William Buche, George Sloan, Edwin Becker and Othmer Mischo, Appellants

Opinion by Justice Broadfoot

This cause came on to be heard on appeal from the judgment of the Circuit Court of Milwaukee County and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the Circuit Court of Milwaukee County, in this cause, be, and the same is hereby, affirmed.

[fol. 164] STATE OF WISCONSIN: IN SUPREME COURT

No. 146

August Term, 1949

WISCONSIN EMPLOYMENT RELATIONS BOARD, Respondent,

v.

AMALGAMATED ASSOCIATION OF STREET, ELECTRIC RAILWAY AND MOTOR COACH EMPLOYES OF AMERICA, DIVISION 998, et al., Appellants

Appeal from a judgment of the circuit court for Milwaukee County: Daniel W. Sullivan, Circuit Judge. Affirmed.

This action was commenced January 4, 1949, by the Wisconsin Employment Relations Board against the Amalgamated Association of Street, Electric Railway and Motor Coach Employes of America, Division 998, and certain individual defendants who were officers or members of the

general executive board of said association, to perpetually restain and enjoin them from calling a strike or causing an interruption of the public passenger service of the Milwaukee Electric Railway and Transport Company in the state of Wisconsin. The pleadings consisted of the plaintiff's complaint and amended complaint the answer of the [fol. 165] defendants, and a reply to the answer by the plaintiff. Plaintiff moved for judgment on the pleadings, and the motion was granted. Defendants appeal from the judgment entered on April 11, 1949, granting the injunction prayed for in the amended complaint.

The findings of fact made and filed are as follows:

"1. That the Wisconsin Employment Relations Board (hereinafter referred to as the board) is and at all times mentioned herein was an administrative body created and existing pursuant to Chapter 111 of the Wisconsin Statutes and that it has responsibility under sec. 111.63 of the Wisconsin Statutes for enforcement of compliance with the provisions of sec. 111.62.

"2. That the defendant, Amalgamated Association of Street, Electric Railway and Motor Coach Employes of America, Division 998 (hereinafter referred to as Division 998), which has its office and usually transacts business in the City of Milwaukee, Milwaukee County, Wisconsin, is the collective bargaining representative of all employees of the Milwaukee Electric Railway and Transport Company, and that the other named defendants are officers or representatives of said Division 998.

"3. That the Milwaukee Electric Railway and Transport Company is engaged in the business of furnishing public passenger transportation service in Milwaukee County, Wisconsin; that it employs approximately 2700 employees for the purpose of carrying out such service, who are represented by Division 998 for purposes of collective bargaining; that it transports in excess of 100,000,000 passengers annually.

"4. That on or about January 3, 1949, the membership of Division 998 in a secret referendum voted to authorize its general executive board to call a strike at such time as the board should deem proper; that pursuant to such action of the membership the general executive board fixed the date

of the strike of the employees represented by said Division 998 to begin at 4 o'clock A. M. on Wednesday, January 5, 1949; that the defendants released for publication in newspapers of general circulation in Milwaukee County, Wisconsin an announcement of said action by the membership and by the general executive board.

"5. That in obedience to a temporary restraining order issued by the Circuit Court of Milwaukee County the strike so authorized and directed by the membership and the general executive board of Division 998 was temporarily postponed to await the outcome of the action instituted by [fol. 166] this complaint.

"6. That the defendants threaten to instigate, induce, conspire with and encourage other persons, more specifically, 2700 employees of the Milwaukee Electric Railway and Transport Company, to engage in a strike.

"7. That the service of such persons described in the preceding findings are essential to carrying out the operations of said Milwaukee Electric Railway and Transport Company.

"8. That the public passenger transportation service furnished by the Milwaukee Electric Railway and Transport Company is furnished wholly by street car and motor bus within Milwaukee County, Wisconsin; that said service furnished to and for residents of the City of Milwaukee and contiguous suburbs is utilized by employees of many establishments engaged in production of goods for interstate commerce; that the equipment utilized by the company in rendering such service is procured in great measure from points outside the State of Wisconsin; that the National Labor Relations Board conducted an election among employees of the company represented by Division 998 respecting the signing of a union security agreement and certified as a result of said election that Division 998 had complied with the conditions of the National Labor Relations Act so as to remove any obstacles under that act from entering into a union security agreement.

"9. That the defendants threaten to instigate, induce, conspire with and encourage other persons, more specifically 2700 employees of the Milwaukee Electric Railway and

Transport Company, to engage in a strike which will cause interruption of an essential service.

"10. That such conduct of the defendants will work irreparable injury to the plaintiff and to the citizens of the State of Wisconsin, will put the plaintiff to the necessity of bringing a multiplicity of suits, and that said plaintiff has no adequate remedy at law for redress against such conduct."

No testimony was taken in the trial court. As there is no challenge of the above findings they will be accepted as the facts and our decision will be based thereon.

[fol. 167] BROADFOOT, J.:

The defendants upon appeal assert that the judgment should be reversed because ch. 414, Laws of 1947, now secs. 111.50 to 111.65, inclusive, Stats., is not applicable to these defendants; that it is unconstitutional and void because it is repugnant to sec. 7 of the National Labor Relations Act as amended, and is therefore contrary to Art. I, sec. 8 and Art. VI of the United States constitution; the law violates the Fourteenth Amendment to the constitution of the United States and secs. 1, 2, 3, 4, and 9 of Art. I of the Wisconsin constitution; the judgment and the statute upon which it is purportedly based violate the Thirteenth Amendment to the constitution in that they impose involuntary servitude; and further, the judgment is invalid because it is based on ch. 414, Laws of 1947, the several sections of which are unconstitutional and are not severable.

Counsel for the defendants ably advance several persuasive arguments in support of each of their contentions. They might be convincing if the rights of the public in the outcome of this litigation were overlooked. The operations of public utilities have long been subject to scrutiny by regulatory bodies set up by the state to protect the rights of the public. Among the details of their operations subject to regulation are the right to engage in or to discontinue operations, the type and amount of service to be rendered, expansion programs, the type and amount of securities to be issued, rates to be charged, accounting [fol. 168] systems and the amount of depreciation permitted to be charged off. In ordinary commercial enterprises these matters are left to management. On the other hand,

utilities are granted certain privileges by law; such as the elimination of most competition and the right of eminent domain. Persons who invest their savings in the securities of a public utility know their capital is subjected to the regulation and control of the state. They must weigh the advantages against the disadvantages in determining in what type of enterprise they will invest. Management and investors alone cannot operate a public utility. There must be natural persons employed to give it life. All are part of one organization which is subject to control by the state. So persons seeking employment must weigh the advantages and disadvantages of employment by public utilities. There are many advantages to this type of employment: There is generally a continuity of employment in the public utility field; the state has not been adamant in refusing higher rates when necessary to improve service and working conditions or to bring wages to a standard comparable to wages in other lines of endeavor; the public, too, has been generous in its acceptance of higher rates when they are necessary to pay utility employees suitable wages; utilities may not cease operations nor lock out employees. It is with this in mind that we approach the questions to be determined.

As to the contention that the law does not apply to the defendant employees, the pertinent portions of sec. 111.51, [fol. 169] Stats. reads as follows:

"111.51 Definitions. When used in this subchapter:

"(1) 'Public utility employer' means any employer (other than the state or any political subdivision thereof) engaged in the business of furnishing water, light, heat, gas, electric power, public passenger transportation or communication, or any one or more of them, to the public in this state; * * * This subchapter does not apply to railroads nor railroad employes.

"(2) 'Essential service' means furnishing water, light, heat, gas electric power, public passenger transportation or communication, or any one or more of them, to the public in this state."

Webster's New International Dictionary (Second Edition) Unabridged, distinguishes between railroads and railways as follows:

"*Railroads* • • • is usually limited to roads for heavy steam transportation and also to steam roads partially or wholly electrified or roads for heavy traffic designed originally for electric traction. The lighter electric street-car lines and the like are usually termed *railways*."

This is the common and approved usage of the term "railroad" and it is generally so understood when the term is used. The employer is engaged in public passenger transportation and is clearly covered by the act. It is also engaged in furnishing an essential public service under the definitions contained in the act. The defendants, as employees, are likewise subject to the act.

The second contention, that the law is repugnant to the National Labor Relations Act and is therefore unconstitutional, has been answered in the case of *International Union, Local 232, et al. v. Wisconsin Employment Relations Board et al.* 336 U. S. 245. The decision in that case was filed after the commencement of this action. It was ren- [fol. 170] dered on an appeal from a decision of this court, 250 Wis. 550. In that decision, the United States supreme court announced that neither paragraph 7 nor 13 confers upon employees an absolute right to engage in every kind of strike or other concerted activity. The following quotations are from said decision:

"• • • The latter decisions and our own, *Labor Board v. Fansteel Corp.*, 306 U. S. 240; *Southern S. S. Co. v. Labor Board*, 316 U. S. 31; *Labor Board v. Sands Mfg. Co.* 306 U. S. 332; *Allen Bradley Local v. Wisconsin Employment Relations Board*, 315 U. S. 740; and see *Hotel and Restaurant Employees Local* v. *Wisconsin Employment Relations Board*, 315 U. S. 437, clearly interdict any rule by the Board that every type of concerted activity is beyond the reach of the states' adjudicatory machinery. The bare language of sec. 7 cannot be construed to immunize the conduct forbidden by the judgment below and therefore the injunction as construed by the Wisconsin Supreme Court does not conflict with sec. 7 of the Federal Act."

"Reliance also is placed upon sec. 13 of the Labor Relations Act, which provided, 'Nothing in this Act shall be construed so as to interfere with or impede or diminish in any way the right to strike.' 49 Stat. 449, 457. The 1947 Amendment carries the same provision but that Act in-

cludes a definition. Section 501 (2) says that when used in the Act 'The term "strike" includes any strike or other concerted stoppage of work by employees (including a stoppage by reason of the expiration of a collective bargaining agreement) and any concerted slowdown or concerted interruption of operation by employes.' 61 Stat. 161.

"This provision, as carried over into the Labor Management Act, does not purport to create, establish or define the right to strike. On its face it is narrower in scope than sec. 7—the latter would be of little significance if 'strike' is a broader term than 'concerted activity.' Unless we read into sec. 13 words which Congress omitted and a sense which Congress showed no intention of including, all that this provision does is to declare a rule of interpretation for the Act itself which would prevent any use of what originally was a novel piece of legislation to qualify or impede whatever right to strike exists under other laws. It did not purport to modify the body of law as to the legality of strikes as it then existed. * * *"

The third contention of the defendants is that the act is in violation of certain constitutional guarantees in that it denies to defendants equal protection of the laws, it [fol. 171] deprives the union and its members of their liberties to contract and of their property without due process of law; that it permits involuntary servitude, denies the union and its members the constitutional right of free speech and the right to assemble to consult for the common good, and to petition the government, and that the statute is so vague and indefinite that its application is in violation of due process of law.

The rights guaranteed by both the federal and state constitutions are individual rights, and they are not absolute. In *Carpenters Union v. Ritter's Cafe*, 315 U. S. 722, 725, it was stated:

"Where, as here, claims on behalf of free speech are met with claims on behalf of the authority of the state to impose reasonable regulations for the protection of the community as a whole, the duty of this Court is plain. Whenever state action is challenged as a denial of 'liberty,' the question always is whether the state has violated 'the essential attributes of that liberty.' Mr. Chief Justice

Hughes in *Near v. Minnesota*, 283 U. S. 697, 708. While the right of free speech is embodied in the liberty safeguarded by the Due Process Clause, that Clause postulates the authority of the states to translate into law local policies 'to promote the health, safety, morals and general welfare of its people. * * * The limits of this sovereign power must always be determined with appropriate regard to the particular subject of its exercise.' Ibid at 707."

The prohibitions of the statute under review are against the actions of more than one individual when acting in concert. We cannot see that any individual rights are infringed upon. If there is such infringement, it must be recognized that it is in recognition of the paramount rights of the public. The United States supreme court recognized this in the case of *International Union, Local 232, et al. v. Wisconsin Employment Relations Board et al., supra*, p. 259, when [fol. 172] it stated:

"* * * This Court less than a decade earlier had stated that law (National Labor Relations Act) to be that the state constitutionally could prohibit strikes and make a violation criminal. It had unanimously adopted the language of Mr. Justice Brandeis that 'Neither the common law, nor the Fourteenth Amendment, confers the absolute right to strike.' *Dorchy v. Kansas*, 272 U. S. 306, 311. Dissenting views most favorable to labor in other cases had conceded the right of the state legislature to mark the limits of tolerable industrial conflict in the public interest. *Duplex Co. v. Deering*, 254 U. S. 443, 488. This Court has adhered to that view. * * *"

Mr. Justice Frankfurter also stated this rule in *Carpenters Union v. Ritter's Cafe*, 315 U. S. 722, 728, as follows:

"* * * We hold that the Constitution does not forbid Texas to draw the line which has been drawn here. To hold otherwise would be to transmute vital constitutional liberties into doctrinaire dogma. We must be mindful that 'the rights of employers and employees to conduct their economic affairs and to compete with others for a share in the products of industry are subject to modification or qualification in the interests of the society in which they exist.' This is but an instance of the power of the State to set the limits of permissible contest open to industrial combatants.' *Thornhill v. Alabama*, 310 U. S. 88, 103-04."

The contention that the legislation is unconstitutional because it imposes involuntary servitude is answered by the language of the statute itself. Sec. 111.64, Stats. reads as follows:

"Construction. (a) Nothing in this subchapter shall be construed to require any individual employe to render labor or service without his consent, or to make illegal the quitting of his labor or service or the withdrawal from his place of employment unless done in concert or agreement with others. No court shall have power to issue any process to compel an individual employe to render labor or service or to remain at his place of employment without his consent. It is the intent of this subchapter only to forbid employes of a public utility employer to engage in a strike [fol. 173] or to engage in a work slowdown or stoppage in concert, and to forbid a public utility employer to lock out his employes, where such acts would cause an interruption of essential service.

"(b) All laws and parts of laws in conflict herewith are to the extent of such conflict concerning the subject matter dealt with in this subchapter, supplanted by the provisions of this subchapter."

Instead of being subject to involuntary servitude the employees of public utilities enjoy certain advantages, such as continuity of employment, that were mentioned above.

Since we have held in *United Gas, Coke & Chemical Workers of America, etc. v. Wisconsin Employment Relations Board*, 255 Wis. 154, — N. W. (2d) ——, and do now hold the statute to be constitutional, the final contention of the defendants that the several sections thereof are not severable need not be determined.

By the Court—Judgment Affirmed.

[fol. 174] [Stamp:] Filed May 20, 1950. Arthur A. McLeod, Clerk of Supreme Court, Madison, Wis.

In Supreme Court, State of Wisconsin, August Term, 1949

No. 146

Wisconsin Employment Relations Board, Plaintiff and Respondent,

vs.

Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, Division 998, George Koechel, Charles Brehm, Thomas Murach, Raymond Knutson, Jack Wery, Joe Dersinzski, Howard Lynch, Herman Weber, Paul Brehm, Paul Kraft, Steve Malick, William Buche, George Sloan, Edwin Becker and Othmar Mischo, Defendants and Appellants

Motion for Rehearing

Now come the Appellants above named, and respectfully move this Honorable Court to grant a rehearing in the above entitled case, on the grounds and for the reasons to be assigned in the printed brief which will be filed in support hereof.

Dated at Milwaukee, Wisconsin, May 16th, 1950.

Padway, Goldberg & Previant, Attorneys for Defendants and Appellants.

Admission of Service

Due and personal service of copy of Motion for Rehearing by Appellants, in the above entitled action, is hereby admitted this 17 day of May, A. D. 1950

Beatrice Lampert, Attorney for Wisconsin Employment Relations Board.

[fol. 175] And afterwards to-wit on the 30th day of June, A. D. 1950, the same being the 81st day of said term, the

motions were denied in words and figures following, that is to say:

Milwaukee Circuit Court

WISCONSIN EMPLOYMENT RELATIONS BOARD, Respondent,

vs.

AMALGAMATED ASSOCIATION OF STREET, ELECTRIC RAILWAY AND MOTOR COACH EMPLOYES OF AMERICA, DIVISION 998, et al., Appellants

AMALGAMATED ASSOCIATION OF STREET, ELECTRIC RAILWAY AND MOTOR COACH EMPLOYES OF AMERICA, DIVISION 998, et al., Appellants,

vs.

WISCONSIN EMPLOYMENT RELATIONS BOARD, et al., Respondents

The Court being now sufficiently advised of and concerning the motions of the said appellants for a rehearing in these causes, it is now here ordered that said motions, be, and the same are hereby, denied with $25.00 costs in each case.

[fol. 176] Clerk's Certificate to foregoing transcript omitted in printing.

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1950

No. 329

ORDER ALLOWING CERTIORARI—Filed November 6, 1950

The petition herein for a writ of certiorari to the Supreme Court of the State of Wisconsin is granted. The case is transferred to the summary docket and assigned for argument immediately following No. 302, St. John et al. vs. Wisconsin Employment Relations Board et al.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.